United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al.,	:	
Plaintiffs-Appellees,	:	Docket No. 74-1434
v.	:	
MICHAEL KERN, et al.,	:	
Defendants-Appellants.	:	

PETITION FOR EN BANC REHEARING

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, petitioners respectfully request a rehearing of this appeal en banc. Rule 35(a) provides in part that hearing or rehearings en banc ordinarily will not be ordered "except (1) when consideration of the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Such a hearing is warranted in this case because of the exceptional importance of the issues presented.

This action was brought by indigent criminal defendants awaiting trial in the Brooklyn House of Detention for Men on behalf of themselves and all other detained persons awaiting trial on Kings County felony indictments. The United States District for the Eastern District of New York (Judd, D.J.), ruling on

plaintiffs' motion for a preliminary injunction, entered an order requiring that persons detained under Kings County indictments be permitted to demand a trial after six months of incarceration (nine months for those accused of murder) and, if not brought to trial within 45 days of the demand, be released on their own recognizance. Wallace v. Kern, 371 F.Supp. 1384 (E.D.N.Y. 1974). This Court granted a stay pending appeal on April 2, 1974. On July 8, 1974, a panel of this Court reversed and vacated the District Court's order.

The issue of prolonged trial delays for incarcerated defendants has been before this court before. "We have noted more than once in the past that funding facilities and personnel in Kings County are chronically inadequate to the task of bringing criminal cases promptly to trial." United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1315 (2d Cir., 1971) (en banc). Two years later, the Court expressed its hope "that the serious conditions disclosed by the record in this case will be eliminated by the State's provision of additional judges, facilities, and personnel needed to enable the State judiciary to afford a speedy trial to each person who is incarcerated pending trial." Thorne v. Warden, Brooklyn House of Detention for Men, 479 F.2d 297 (2d Cir., 1973). The panel noted:

> "As of July 1973 there were over 700 persons named in indictments in the Kings County Supreme Court who had been in custody for more than six months, 210 of whom had been in custody for more than a year. Lengthy pre-trial confinement continues to be the rule in

> Kings County, despite the reform measures outlined by Justice Damiani . . . . By January 1974 there were still 398 inmates awaiting trial who had suffered more than six months' confinement. The time lapse from the date of arrest to the date of trial in run-of-the-mill case has been as long as 27 months." Sl.op. at 4783.

Petitioners believe the instant action merits rehearing en banc as to two issues:

1. Whether prospective relief from prolonged trial delays for incarcerated persons may be granted on a class basis, where that does not involve dismissal of state prosecutions.

2. Whether excessive periods of incarceration without a judicial determination of guilt or innocence are themselves violative of due process.

With regard to the first point, the panel's decision evinces a misunderstanding both of the lower court's order and of the applicable law. The panel erred in its view that Judge Judd's order "quantified [the Sixth Amendment] into a specific time period Sl.op. 4784. The order did not quantify the Sixth Amendment or otherwise establish a new constitutional rule. Instead, it imposed an equitable remedy intended to prevent irreparable loss of liberty and certain prejudice to the Sixth Amendment rights of many class members. While there is no constitutional right to be tried within six months, a federal district court may use that period as the basis for equitable relief designed to protect plaintiffs' rights. This distinction was explicitly recognized by the Supreme Court in its holding that a mathematical ratio may be used as the

basis for an equitable remedy for school segregation, even though there is no substantive constitutional right to any particular degree of racial balance. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24-25 (1971). The panel's failure to appreciate this distinction between right and remedy amounts to a failure to understand the nature and purpose of the order below.

Properly understood, the six and nine month periods of the order must be evaluated as an exercise of equitable discretion as to remedy, and the proper standard of review is whether the lower court abused its discretion. Professor Bernard Segal, plaintiffs' expert witness whose testimony was accepted as true by the District Court, testified that the deleterious effects of pretrial detention become very serious after three months. 371 F.Supp. at 1388. Pertinent rules and standards regarding trial delays for incarcerated persons generally employ a six month limit. (Brief of Appellees, pp. 37-38). The order below, if anything, is less extreme than the facts warrant and cannot possibly be considered an abuse of discretion.

The panel also erred in holding that prospective relief against unconstitutional trial delays may not be granted on a class basis. Citing the Supreme Court's assertion of an ad hoc balancing test for the denial of a speedy trial in Barker v. Wingo, 407 U.S. 514, 530-533 (1972), the panel held that the District Court had "ignored the mandate to proceed on a case-by-case basis." Sl.op. at 4784.

This holding takes no account of the prospective nature of the relief sought. In Barker v. Wingo, supra, the issue was whether, as of the time of the trial, a speedy trial had been denied. Here, appellees asked that the denial of speedy trials be prevented. The distinction was made abundantly clear by the Supreme Court less than a year after Barker in Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484 (1973). There, the petitioner was imprisoned in Alabama and sought immediate trial on an open charge in Kentucky. The Court held that, although federal courts are an improper forum for constitutional defenses to a state prosecution, the petitioner could assert his present right to a speedy trial and demand enforcement of the state's obligation to bring him promptly to trial. 410 U.S. 490-91. The present right to be brought to trial promptly was thus distinguished from the right to dismissal in default of a prompt trial.

When the claim is of the completed denial of the right and the relief sought is dismissal, Barker mandates strict case-by-case inquiry. This is due both to the severe nature of the remedy and the fact that important interests protected by dismissal, including avoidance of impairment of the defense, may vary tremendously from case to case. But where, as here, the claim is the present denial of a speedy trial -- i.e., the threat of the completed violation -- and the relief sought is the avoidance of oppressive pretrial incarceration, class treatment may be appropriate if "the party opposing the class has acted or refused to act on

grounds generally applicable to the class...." F.R.Civ.P. 23(b)(2). As Judge Judd noted, "[t]he oppressive character of prolonged incarceration does not differ vitally among different defendants, and therefore is particularly appropriate for relief in a class action." 371 F.Supp. at 1391. In short, both Barker v. Wingo and Judge Judd's order in this case are consistent with the general requirement of F.R.Civ.P. 23(a) that there be "questions of law or fact common to the class" in order for a class action to be maintained.*/

The second major error in the panel's decision is its failure to address the constitutionality of excessive periods of pretrial incarceration irrespective of Sixth Amendment considerations. The court below held that "over-long confinement without being convicted, simply for being poor, is also a denial of due process of law." 371 F.Supp. 1389. It is well established that jail conditions that are unnecessarily restrictive and oppressive deny the due process of law to pretrial detainees entitled to the presumption of innocence. Rhem v. McGrath, 326 F.Supp. 681 (S.D. N.Y. 1971), and the other cases cited in brief of Appellees, p. 29. Restrictions on detainees must be reasonably limited to what is

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*/ We note in passing the panel's misconception that Judge Judd's order "embodies the demand waiver rule which was repudiated by the Supreme Court in Barker." Sl.op. at 4785. While the order provides relief only for those who ask for a trial, it in no way forecloses any person from raising Sixth Amendment claims either as a constitutional defense to his prosecution or in an individual collateral proceeding. For that matter, a person actually tried in compliance with the order could raise such claims of the facts of his individual case so warranted.

necessary to keep them safely in jail and thus assure their presence in court, the only constitutionally acceptable reason for pretrial detention or any other restriction of an unconvicted person's liberty. Cf. Stack v. Boyle, 342 U.S. 1 (1951); United States v. Foster, 278 F.2d 567, 570 (2nd Cir. 1960), cert. denied, 364 U.S. 834 (1960). It follows a fortiori that needlessly prolonged pretrial detention, even under better conditions than appellees enjoy, denies due process.

When government restricts a constitutional right, it must do so in the least drastic way available. Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Where the right involved is the most fundamental of all, freedom from actual incarceration, governmental infringements on that right must be kept within the narrowest bounds. The failure of the panel to address this issue -- raised in the lower court's opinion, in the Brief of Appellees (pp. 28-30), and at the oral argument -- compels reconsideration of this case.

Thic Court has recognized the importance of cases like this in previous grants of en banc consideration. The issue of lengthy trial delays for incarcerated defendants was heard en banc three years ago because of the active judges' concurrence that "the delay in the trial of criminal cases, where defendants are held in jail awaiting trial, in the courts of many of the counties of New York raises serious questions of the violation of constitutional rights." United States ex rel. Frizer v. McMann, supra, 1313n. In Rodriguez v. McGinnis, 456 F.2d 79 (2nd Cir.

1972), rev'd sub nom Preiser v. Rodriguez, 411 U.S. 475 (1973), the issue was also the constitutional rights of state prisoners, in that case after conviction. In Sostre v. McGinnis, 442 F.2d 148 (2nd Cir. 1971), another case involving state prisoners' constitutional rights, this Court voted to hear the initial argument en banc "so that we might give plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems...." Id. at 181. The last description might have been coined for this case.

The issues here are of similar nature and equal gravity to those cited. They are more than techinical quibbles and harmless oversights. They go directly to poor people's ability to obtain some measure of justice in the state's criminal courts. The speedy trial guarantee is designed: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker v. Wingo, 407 U.S. at 532. The evidence showed that the prolonged incarceration suffered by many members of the class results in loss of liberty, economic loss, anxiety, stress, an extremely high suicide rate, disruption of employment and family relations, impairment of the right to counsel, and coercion to plead guilty. 371 F.Supp. 1388.

The panel's decision, in relegating appellees to individual remedies, in fact leaves them no remedy at all. The absence of meaningful state remedies is fully discussed and documented in

Judge Judd's findings of fact. 371 F.Supp.1389-1390. Federal habeas corpus is no substitute. The burden placed on the federal courts by post-conviction proceedings is already notorious; it is highly unrealistic to believe that the District Court could deal with all the colorably meritorious petitions that could be filed by members of the class without developing a backlog comparable to that of the Kings County Supreme Court. Realistically, of course, these petitions will not be filed. Appellees, being poor, are represented by assigned counsel whose services have already been found constitutionally inadequate, if not remediable in federal court. Wallace v. Kern, Memorandum Opinion, E.D.N.Y., May 10, 1973, rev'd on other grounds, 481 F.2d 621 (2nd Cir. 1973) (per curiam), cert. denied. 94 S.Ct. 879 (1974). There is not and cannot be the legal manpower to assert appellees' rights individually without a commitment of public funds that the state has persistently refused to make. And even the successful assertion of individual claims would present no solution to the continuing problem. A person who demands and obtains an early trial may vindicate this own rights, but he does so at the expense of others whose trials are delayed even further by his success. Appellees are competing with one another for an inadequate supply of judicial resources. An approach that does not recognize the systemic nature of the problem and formulate relief that meets the problem on that level is an exercise in futility.

It is no answer to say that federal courts "have no supervisory authority over state courts and have no power to establish rules of practice for the state courts." Sl.op. at 4786. Federal courts have no supervisory authority over state schools, prisons, welfare systems, police departments, or any other state institutions; but they have the power and the duty to protect constitutional rights when state agencies of any sort infringe upon them. It would be preferable for the states on their own to desegregate their schools, operate their prisons humanely, and avoid improper discrimination in their welfare systems; but when they do not, the victims of their unconstitutional practices are entitled to a federal court remedy under the Civil Rights Act.

The same principle governs the unconstitutional practices of state court systems. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973), cert. granted, 94 S.Ct. 595 (1973) (class action against denial of preliminary hearings); Conover v. Montemuro, 477 F.2d 1073 (3rd Cir. 1973) (en banc) (class action against family court intake procedures); Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971) (class action against discriminatory classification of certain youthful offenders); Penn v. Eubanks, 360 F.Supp. 699 (M.D. Ala. 1973) (class action against discriminatory jury selection); Gilliard v. Carson, 348 F.Supp. 757 (M.D.Fla. 1972); Green v. City of Tampa, 335 F.Supp. 293 (M.D.Fla. 1971); Bramlett v. Peterson, 307 F.Supp. 1311 (M.D.Fla. 1969) (class actions against denial of counsel to indigents). Any deference due the state on the particular issue of this case has been obviated by the state's default

in solving the problem. This Court stayed its hand in United States ex rel. Frizer v. McMann, supra, believing that newly promulgated state rules of court would solve the problem. Those rules were pre-empted by the legislature after the Court's decision. The Court again criticized the excessive delays suffered by detainees in Thorne v. Warden, 479 F.2d 297 (2d Cir. 1973), advising the state to provide a way to "afford a speedy trial to each accused person who is incarcerated pending trial." Id. at 300. No meaningful solution is at hand, and it is now clear that appellees' rights will not be protected unless the federal courts act. This is a responsibility which must be faced and not abdicated.

For this reason the panel's decision is intolerable as a matter of policy as well as wrong as a matter of law. The real question presented is whether the rights to speedy trial and to due process of law extend to poor people in fact or only in form. To relegate them to individual remedies in the circumstances of this case is to ignore the realities of urban mass justice and to leave them with no remedies at all. Hence this case must be reheard, and the District Court's remedy reinstated.

WHEREFORE, petitioners respectfully request that this Court rehear and decide these appeals en banc.

Respectfully submitted,

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Dated: New York, N.Y.
July 22, 1974

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of July, 1974, one copy of the enclosed Petition for En Banc Rehearing was personally served on:

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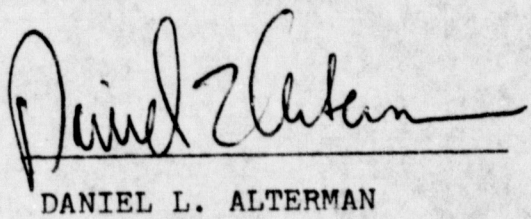

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